Vet. App. No. 16-0498

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

KENNETH GILYARD,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

SELKET N. COTTLE
Deputy Chief Counsel

SARAH W. FUSINA
Senior Appellate Attorney
Office of the General Counsel (027I)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7139

Attorneys for Appellee

TABLE OF CONTENTS

ISSUE PRESENTED.....1

STATEMENT OF THE CASE 1

A. JURISDICTIONAL STATEMENT.....2

B. NATURE OF THE CASE 2

C. STATEMENT OF RELEVANT FACTS 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT ……. 5

The Board provided an adequate statement of reasons or bases for denying an increased rating for Appellant's left knee……..……..…….5

CONCLUSION ……. 10

TABLE OF AUTHORITIES

Federal Cases

Allday v. Brown, 7 Vet.App. 517 (1995) 5
Breeden v. Principi, 17 Vet.App. 475 (2004) 2
Brown v. Gardner, 513 U.S. 115 (1994) 7
Cacciola v. Gibson, 27 Vet.App. 45 (2014) 3
Esteban v. Brown, 6 Vet.App. 259 (1994) 9
Gilbert v. Derwinski, 1 Vet.App. 49 (1990) 5
Grivois v. Brown, 6 Vet.App. 136 (1994) 3
Hilkert v. West, 12 Vet.App. 145 (1999) 9
Hyder v. Derwinski, 1 Vet.App. 221 (1991) 8, 9
Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007) 8, 9
Johnston v. Brown, 10 Vet.App. 80 (1997) 5
Kern v. Brown, 4 Vet.App. 350 (1993) 8, 9
Monzingo v. Shinseki, 26 Vet.App. 97 (2012) 8
Pederson v. McDonald, 27 Vet.App. 276 (2015) 3
Perrin v. United States, 444 U.S. 37 (1979) 7, 9
Shinseki v. Sanders, 556 U.S. 396 (2009) 9
Tesoro Hawaii Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005) 7, 9
Tropf v. Nicholson, 20 Vet.App. 317 (2006) 7

Federal Statutes

38 U.S.C. § 7252(a) 2
38 U.S.C. § 7261 5

Federal Regulations

38 C.F.R. § 4.71a, Diagnostic Code 5257 ..... 5, 6, 8
38 C.F.R. § 4.71a, Diagnostic Code 5259 ..... 5, 8
38 C.F.R. § 4.40 6
38 C.F.R. § 4.45 6
38 C.F.R. § 4.14 9

CITATIONS TO THE RECORD BEFORE THE AGENCY

R. at 1-27 (December 30, 2015, Board Decision) 4, 5, 6, 9
R. at 443-48 (May 20, 2014, Supplemental Statement of the Case) 4
R. at 512-25 (November 19, 2013, Hearing) 4
R. at 540-41 (October 10, 2013, Appeal to the Board) 4
R. at 545-70 (October 4, 2013, Statement of the Case) 4
R. at 646-47 (June 24, 2013, Notice of Disagreement) 4

R. at 685-98 (January 16, 2013, Rating Decision) 4
R. at 734-40 (December 2012 VA Examination) 4, 6, 8
R. at 763 (April 2012 Orthopedic Consult) 6, 8
R. at 766-67 (January 2011 Orthopedic Consult) 7
R. at 818-24 (May 2012 VA Examination) 4, 6, 8
R. at 832 (May 2012 Imaging Result) 6
R. at 1200 (March 2012 Imaging Result) 6, 8
R. at 1232-43 (November 2006 Rating Decision) 4
R. at 1268-79 (June 2006 Application for Compensation) 4
R. at 1435-38 (May 1993 Application for Compensation) 4, 7
R. at 1439 (DD-214) 4
R. at 2312 (January 2011 Orthopedic Consult) 8
R. at 2332-41 (June 29, 2012, Rating Decision) 4

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

KENNETH GILYARD,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 16-0498
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board), December 30, 2015, decision, which determined (1) that no new and material evidence had been received with regards to a claim of entitlement to service connection for headaches, possible migraine, type, and thus, that claim was not reopened and service connection remained denied, and (2) denied entitlement to an initial disability rating in excess of 10 percent for service-connected left knee arthritis prior to April 1, 2014, where the Board's findings are plausibly based on the evidence of record and supported by Department of Veterans Affairs (VA) statutes and regulations as well as an adequate statement of reasons or bases.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review the final decisions of the Board under 38 U.S.C. § 7252(a).

The portions of the Board's decision that remanded the claims of entitlement to (1) a disability rating in excess of 30 percent for service-connected total left knee replacement on and after June 1, 2015; (2) an initial rating in excess of 10 percent for service-connected right shoulder strain; (3) an initial compensable rating for service-connected right shoulder scar associated with right shoulder strain; (4) service connection for carpal tunnel syndrome, upper right extremity, to include as secondary to a service-connected disability; and (5) service connection for posttraumatic stress disorder, are not final decisions of the Board; thus, this Court does not have jurisdiction over those claims. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (A Board remand "does not represent a final decision over which this Court has jurisdiction").

B. NATURE OF THE CASE

On December 30, 2015, the Board issued a decision finding (1) that no new and material evidence had been received with regards to entitlement to service connection for headaches, possible migraine type, and thus, that claim was not reopened and service connection remained denied, and (2) denying entitlement to an initial disability rating in excess of 10 percent for service-connected left knee arthritis prior to April 1, 2014.

A timely appeal was filed on February 11, 2016, with respect to the denial of an initial disability rating in excess of 10 percent for service-connected left knee arthritis prior to April 1, 2014.

There are no arguments presented on appeal pertaining to the Board's finding that no new and material evidence had been received with regards to entitlement to service connection for headaches, possible migraine type, and subsequent continued denial of that claim; therefore, this claim has been abandoned. *See Pederson v. McDonald,* 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief."); *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2014) (holding that when appellant expressly abandons an appealed issue or declines to present arguments as to that issue, Appellant relinquishes the right to judicial review of that issue and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

C. STATEMENT OF RELEVANT FACTS

Mr. Kenneth Gilyard (hereinafter "Appellant") has limited his arguments on appeal to his claim for an initial disability rating in excess of 10 percent for service-connected left knee arthritis prior to April 1, 2014. As such, the Secretary has focused his response and recitation of facts accordingly.

Appellant served in the United States Air Force from September 29, 1980,

to May 7, 1993. [Record (R.) at 1439]. In May 1993, Appellant filed an application for compensation for residuals of a knee reconstruction surgery. [R. at 1436 (1435-38)]. Appellant filed another claim for service connection for a left knee injury in June 2006. [R. at 1274 (1268-79)]. Service connection for a left knee injury, status post reconstruction, was denied in November 2006. [R. at 1232-43]. In June 29, 2012, service connection for left knee arthritis based on painful motion of the knee was granted with a 10 percent rating. [R. at 2340 (2332-41)].

Appellant was afforded a VA knee examination in May 2012, [R. at 818-24], and December 2012, [R. at 734-40]. A January 16, 2013, rating decision denied an increased rating for left knee arthritis in excess of 10 percent. [R. at 697 (685-98)]. Appellant submitted a Notice of Disagreement on June 24, 2013. [R. at 646-47]. A statement of the case was issued on October 4, 2013, continuing to deny Appellant's claim. [R. at 545-70]. Appellant appealed to the Board on October 10, 2013. [R. at 540-41]. Appellant was afforded a hearing on November 19, 2013. [R. at 512-25]. On May 20, 2014, a supplemental statement of the case continued to deny an increased rating. [R. at 447 (443-48)]. The Board issued the decision on appeal on December 30, 2015, finding that prior to April 1, 2014, which is when Appellant received a total knee replacement, a rating of 10 percent is proper. [R. at 1-27]. The Board considered Appellant's reports of pain, but found there was no evidence of ankylosis in the knee, no evidence of subluxation or instability, no evidence of

dislocated or removed cartilage, and no evidence that Appellant's flexion was limited to a compensable degree. [R. at 13].

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision of December 30, 2015, because Appellant has failed to demonstrate prejudicial error in the Board's decision to deny entitlement to an initial disability rating in excess of 10 percent for service-connected left knee arthritis prior to April 1, 2014. Appellant argues that separate ratings under 38 C.F.R. § 4.71a, Diagnostic Codes 5257 and 5259 should have been considered. However, Appellant's assertions are premised on a misreading and misapplication of those Diagnostic Codes. The Board's decision to deny a rating in excess of 10 percent for left knee arthritis prior to April 1, 2014, is plausibly supported by the evidence and an adequate statement of reasons or bases. Thus, Appellant is not entitled to remand on his theories of error.

ARGUMENT

The Board provided an adequate statement of reasons or bases for denying an increased rating for Appellant's left knee.

In its decision on appeal, the Board provided an adequate statement of reasons or bases to support its decision to deny a rating in excess of 10 percent prior to Appellant's knee replacement in April 2014. [R. at 13]; *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7261(a)(4); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997) (holding that the Board's determination of the disability rating is a finding of fact reviewing under the "clearly erroneous"

standard of review); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (noting that if the Board's finding of fact is supported by a plausible basis, the Court may not reverse it even if it would have weighed the evidence differently). The Board found that a higher or separate rating was not warranted because there was no evidence of ankylosis, subluxation or instability, dislocated or removed cartilage, or limitation of flexion for a compensable rating. [R. at 10, 13]. Indeed, Appellant's 10 percent rating already encompasses and compensates for his knee pain under 38 C.F.R. §§ 4.40, 4.45. [R. at 13].

Appellant's first argument that he was entitled to a separate rating under Diagnostic Code 5257, *see Appellant's Brief* at 6, reflects a misunderstanding and misinterpretation of the rating schedule. Diagnostic Code 5257 states that the "knee, other impairment of," with "recurrent subluxation or lateral instability," may receive a rating of 10 percent if slight, 20 percent if moderate, or 30 percent if severe. *See* 38 C.F.R. § 4.71a, Diagnostic Code 5257. What Appellant fails to recognize is that mere evidence of subluxation is not sufficient; it must be recurrent. Notably, in the December 2012 VA examination, it was explicitly noted that Appellant did not have a history of recurrent subluxation. [R. at 737]. A May 2012 VA examiner similarly found no evidence or history of recurrent subluxation. [R. at 821].

Although Appellant points to notations of patellar subluxation in March 2012, April 2012, and May 2012, *see Appellant's Brief* at 6 citing [R. at 1200, 763, 832], he has not established that those three isolated instances are

sufficient to satisfy the requirement that the subluxation be "recurrent." The dictionary[1] meaning of "recurrent" when used in medical context is "returning or happening time after time." Appellant first filed for compensation for his left knee in 1993. [R. at 1435-38]. Three notations of subluxation during a period of over two decades, one of which is contradicted by another examination that same month, is not evidence of "recurrent subluxation," based on a plain reading of those terms. *See Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) ("[U]nless otherwise defined, words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning"); *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1346 (Fed. Cir. 2005) ("We construe a regulation in the same manner as we construe a statute, by ascertaining its plain meaning"); *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006) (quoting *Brown v. Gardner*, 513 U.S. 115, 120, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994)) ("On review, if the meaning of the regulation is clear from its language, then that is 'the end of the matter'").

Appellant also baldly asserts that he has instability because he has to wear a brace while walking and walks with a limp. *See Appellant's Brief* at 7. However, other than his bare lay allegation that he believes he has instability, Appellant has not demonstrated that he has lateral instability. In fact, a January 2011 orthopedic surgical note found no ligament instability in Appellant's knee. [R. at 766 (766-67)]. Moreover, VA medical examinations in May 2012 and

[1] *Recurrent*, Merriam-Webster Dictionary *available* at http://www.merriam-webster.com/dictionary/recurrent (last visited, August 15, 2016).

December 2012 both specifically found no instability of station due to the knee and joint stability tests were all normal. [R. at 736-37, 820-21].

Neither Appellant nor his counsel has demonstrated that he possesses any medical expertise to opine that his symptoms demonstrate lateral instability, and his attempt to contradict the findings of VA examiners is meritless. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007) (lay person generally not qualified to offer competent testimony on matters that require medical expertise); *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (noting that, although the appellant "may not agree with the examiner," "he fail[ed] to demonstrate that he ha[d] the competence to rebut [the examiner's] opinion"); *Kern v. Brown*, 4 Vet.App. 350, 352 (1993) (noting that neither counsel nor the appellant were qualified to explain the significance of medical evidence); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose...."). Therefore, Appellant's contentions that a separate rating under Diagnostic Code 5257 was raised by the record and should have been considered are unpersuasive.

Appellant's argument that he was entitled to a separate rating under Diagnostic Code 5259 because there is evidence that his cartilage was torn and that he has degenerative joint disease is similarly based on a misreading and misapplication of the rating schedule. *Appellant's Brief* at 7; [R. at 2312, 1200, 763]. Diagnostic Code 5259 provides for a 10 percent rating for "cartilage, semilunar, removal of, symptomatic." 38 C.F.R. § 4.71a, Diagnostic Code 5259.

Once again, Appellant has not demonstrated that his semilunar cartilage was removed prior to April 2014. Therefore, again, Appellant has failed to satisfy the plain language requirements of the Diagnostic Code. *See Perrin*, 444 U.S. at 42; *Tesoro Hawaii Corp.*, 405 F.3d at 1346.

Additionally, like his previous argument, Appellant has not shown that he or his counsel has the medical expertise to opine that a torn cartilage or degenerative joint disease is somehow synonymous with the complete removal of the semilunar cartilage with symptoms due to such removal. *See Jandreau,* 492 F.3d at 1376-77; *Kern*, 4 Vet.App. at 352; *Hyder*, 1 Vet.App. at 225. Significantly, Appellant's degenerative joint disease and any pain associated with that is already compensated by his 10 percent rating for left knee arthritis under Diagnostic Code 5261. [R. at 11, 13]; *see* 38 C.F.R. § 4.14; *Esteban v. Brown*, 6 Vet.App. 259, 262 (1994) (holding that the rule against pyramiding prohibits multiple evaluations for symptomatology that is duplicative or overlapping). Thus, Appellant's assertions are again unpersuasive.

Appellant bears the burden of demonstrating error on appeal, but in this case, he has not established that the Board committed error warranting remand. *Shinseki v. Sanders,* 556 U.S. 396, 406, 410 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (Appellant bears the burden of persuasion on appeal), *aff'd per curiam* 232 F. 3d 908 (Fed. Cir. 2000).

CONCLUSION

In light of the foregoing, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, asks the Court to affirm the December 30, 2015, Board decision.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

/s/ Sarah W. Fusina
SARAH W. FUSINA
Senior Appellate Attorney
Office of the General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7139

Attorneys for the Appellee
Secretary of Veterans Affairs